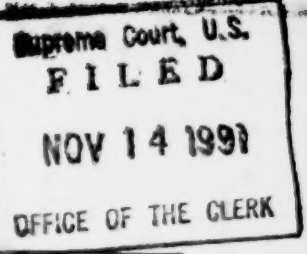


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**NO. 91-569**



IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

OCTOBER TERM, 1991

STATE OF WASHINGTON;  
WASHINGTON STATE PATROL;  
GEORGE B. TELLEVIK,

*Petitioners,*

v.

CONFEDERATED TRIBES OF  
THE COLVILLE RESERVATION;  
LAWRENCE FRY,

*Respondents.*

**REPLY TO OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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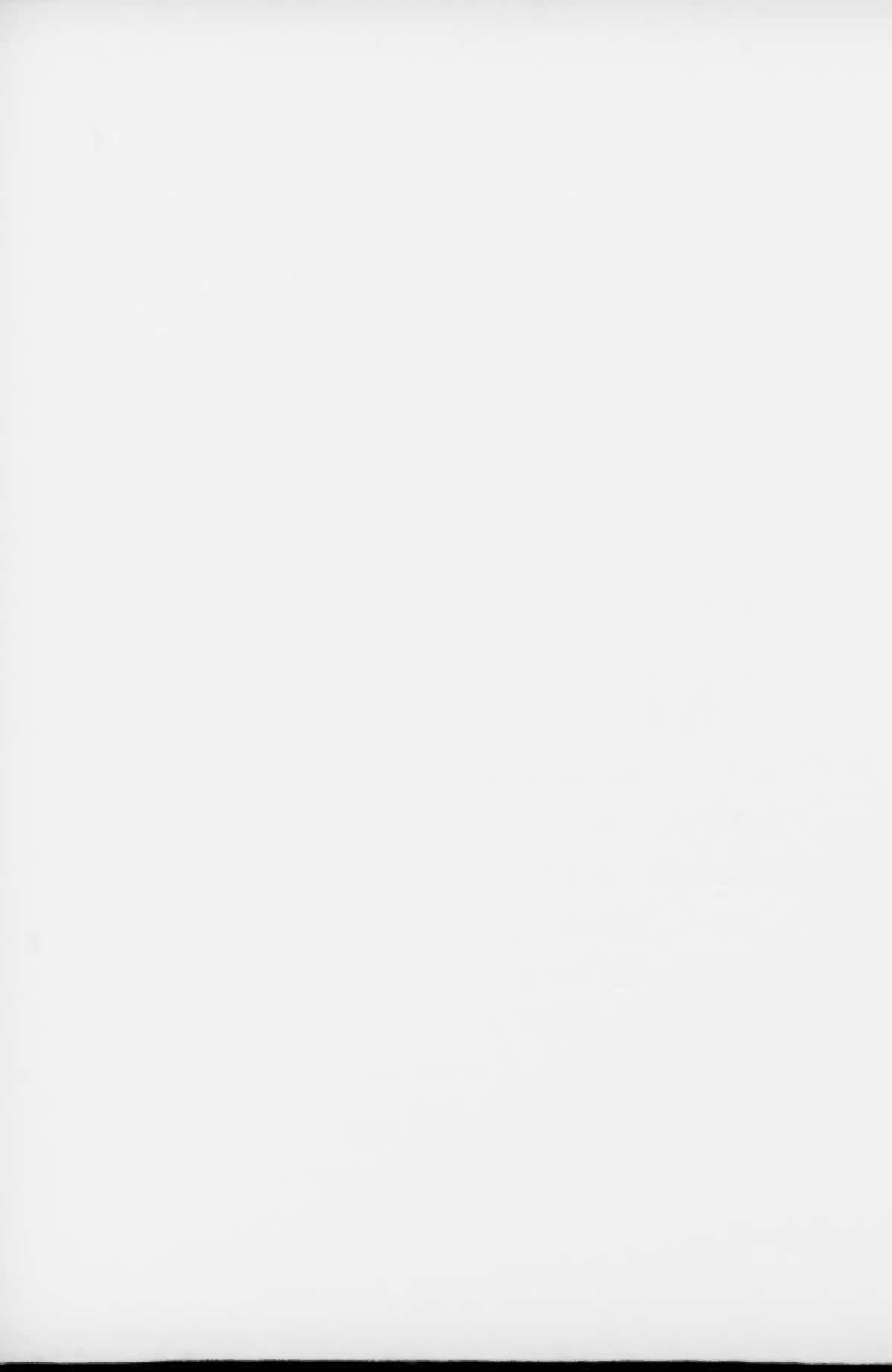
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THE RESPONDENTS' QUESTION PRESENTED  
MISCHARACTERIZES THE ISSUE

The Question Presented by the tribes is essentially whether a unilateral tribal action--adopting tribal traffic ordinances enforced by tribal police--can preempt the state



from exercising jurisdiction within a reservation.<sup>1</sup> This question is not presented in this case. Such a ruling below would clearly present a major question of national significance. Despite the significance of the question presented by the tribes, we cannot concur in their characterization of the circuit court's ruling.

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<sup>1</sup> Respondents' Question Presented states:

"Whether a state, under the civil jurisdiction provisions of Pub. L. 83-280 is precluded from enforcing a scheme of traffic regulation against tribal Indians driving on their reservation which utilizes only state civil jurisdiction, civil procedure, and civil sanctions; when the tribe has adopted a similar civil scheme of traffic regulation, patrols the reservation with tribal police officers, and is given tribal police commissions to enforce tribal law to all municipal, county and state officers willing to accept such tribal commissions?"

Resp. Br. at i (emphasis added).



The tribes' characterization and discussion of the Question Presented is clearly intended to convey the impression that the circuit court's invalidation of long standing state jurisdiction does not create a jurisdictional void. The tribes' attempt to convey the impression that there would be traffic standards in effect. And further that those standards would be equally enforced for tribal members on public highways under tribal restrictions in the same manner as the state standards are enforced for non-tribal members on those public highways. But that assertion has no basis in the Ninth Circuit decision.

The Ninth Circuit concluded that the state lacks jurisdiction vis-a-vis tribal members on public highways within a reservation without any consideration



of whether a tribe does or does not promulgate or enforce traffic safety restrictions for tribal members.<sup>2</sup> The decision does not require that tribal standards, even if imposed, be consistent with traffic safety standards imposed by the state upon non-tribal members utilizing those public highways.

The decision rendered by the circuit court would be equally applicable to all of the twenty-four Indian reservations within the State of

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<sup>2</sup> The circuit court's only comment about tribal enforcement was:

"Indian sovereignty and the state's interest in discouraging speeding are both served by our decision here: the Tribes have enacted a traffic code, employ trained police officers, and maintain tribal courts staffed by qualified personnel to deal with criminal traffic violations."

Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146, 149 (1991). This statement does not constitute a holding of the case.



Washington, without respect to whether the tribal authorities choose or do not choose to enact tribal highway safety codes. Nor would any consideration be given as to whether such tribal ordinances if enacted were enforced.

The actual holding of the circuit court was that there was no state jurisdiction pursuant to Pub. L. 83-280 § 2 (18 U.S.C. § 1162). The circuit court established a per se rule that if an offense does not include the legal possibility of imprisonment, the law cannot be enforced against a tribal member on the reservation. The circuit court's departure from the analysis of the state's policy and the tribal interest required by California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) presents an important

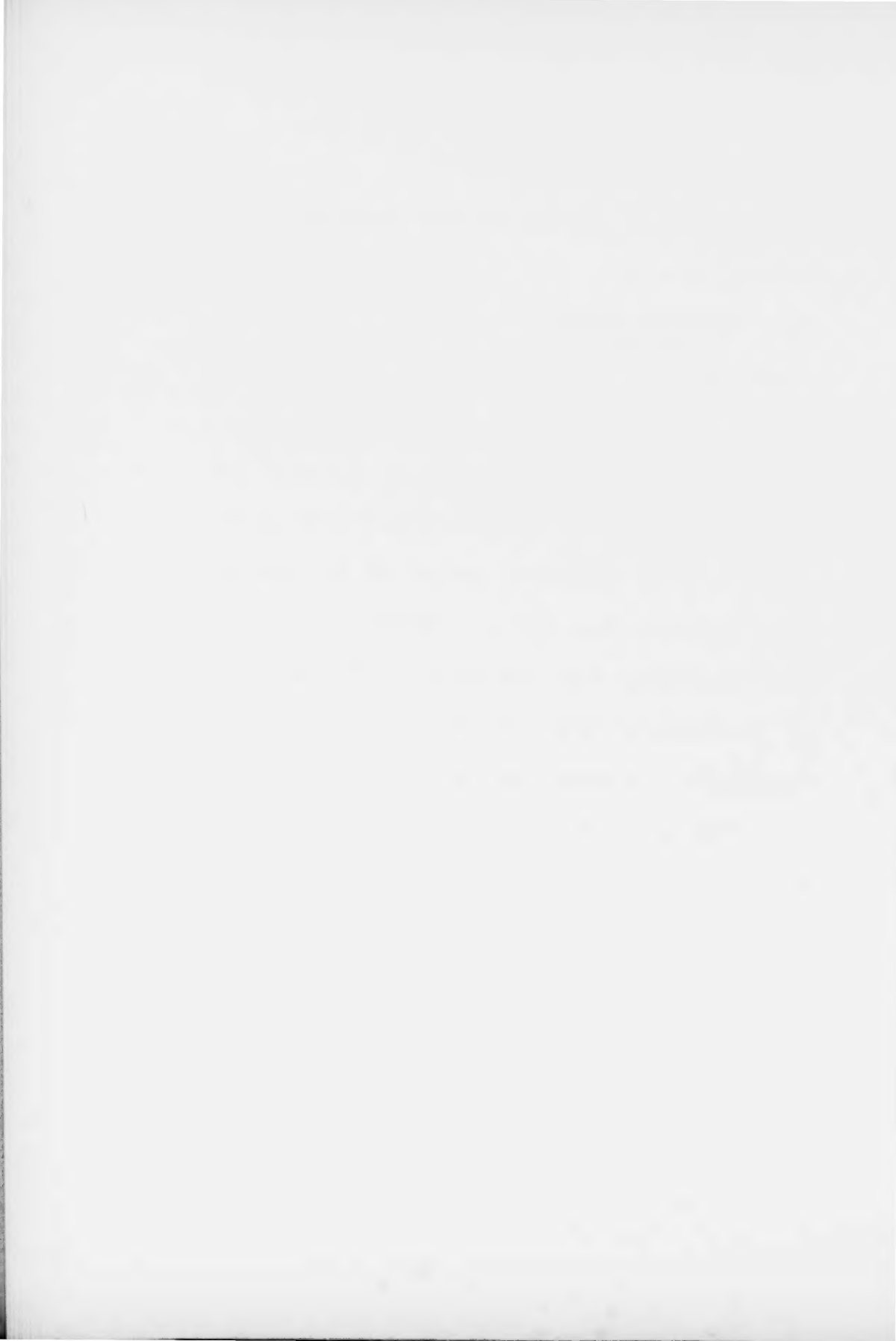


question that should be reviewed by this Court.

**THE STATE'S ASSUMPTION OF JURISDICTION  
UNDER PUB. L. 83-280 WAS NOT  
LIMITED TO CRIMINAL TRAFFIC OFFENSES**

The tribes' Statement of the Case states that "Washington asserted criminal traffic jurisdiction over reservation Indians under PL 83-280 in 1963", Resp. Br. at 1. This statement is misleading for the state's assumption of jurisdiction was not limited to "criminal traffic jurisdiction".

The 1963 act, which is quoted in the Petition, Appendix C-3, (Wash. Rev. Code § 37.12.010), recites that the state obligates "itself to assume criminal and civil jurisdiction over Indians . . ." except "Indians when on their tribal lands are allotted lands within an established Indian reservation . . . ." The statute further provides

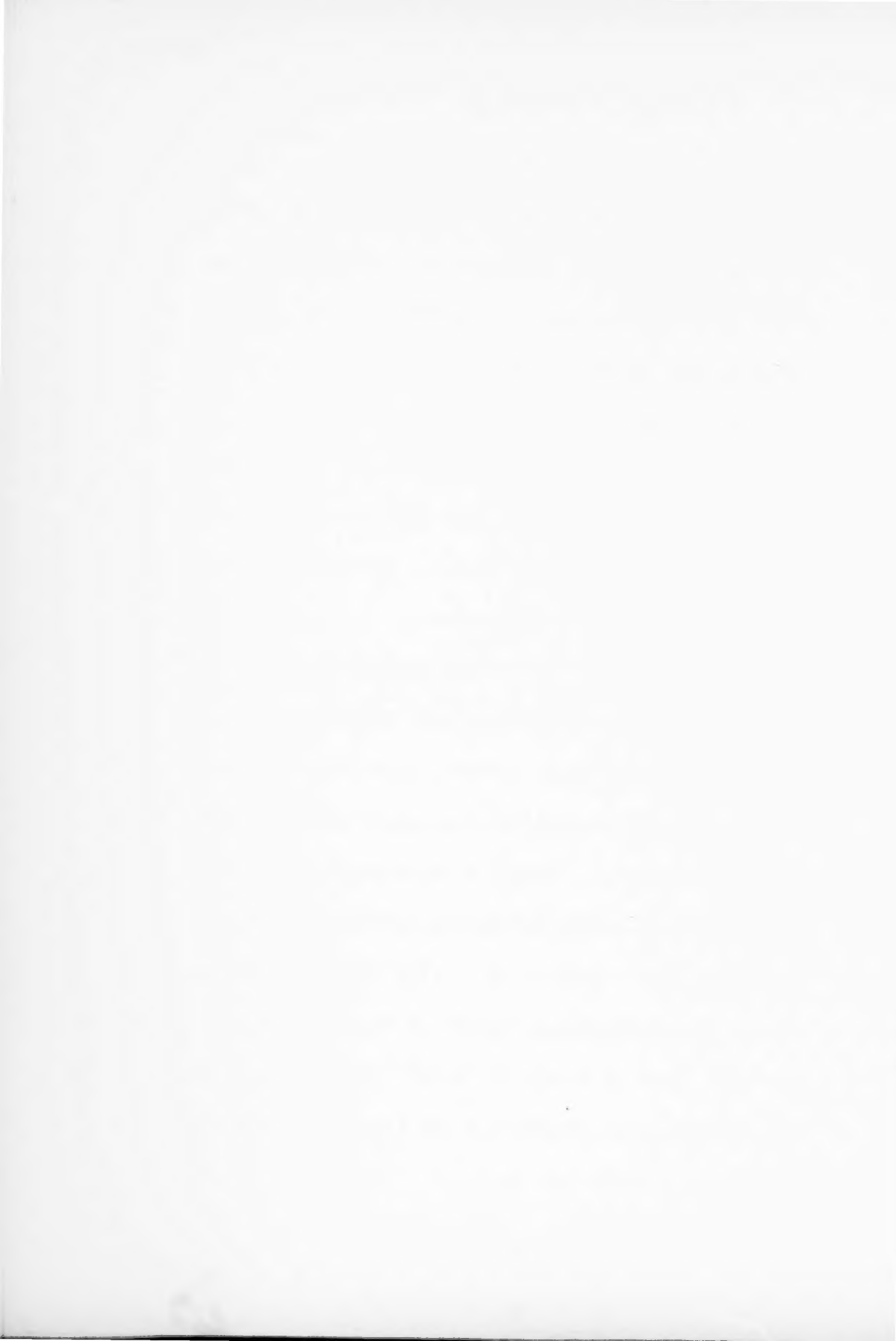


that the exception from state jurisdiction for Indians on tribal lands does not apply to "[o]peration of motor vehicles upon the public streets, alleys, roads and highways. . . ."

Thus, state jurisdiction statute implementing Pub. L. 83-280 was not, as asserted by the tribes, confined to criminal traffic offenses.

**THIS CASE CONCERNS CRIMINAL  
JURISDICTION UNDER § 2 OF PUB. L. 83-280  
NOT CIVIL JURISDICTION UNDER § 4**

The tribes urge the Court to dismiss this Petition because the law is well settled. The tribes point to the bright line test established in Bryan v. Itasca Cy, 426 U.S. 373 (1976) that civil jurisdiction under § 4 of Pub. L. 83-280 (28 U.S.C. § 1360) only applies to disputes between private Indian parties. Pet. at 5.

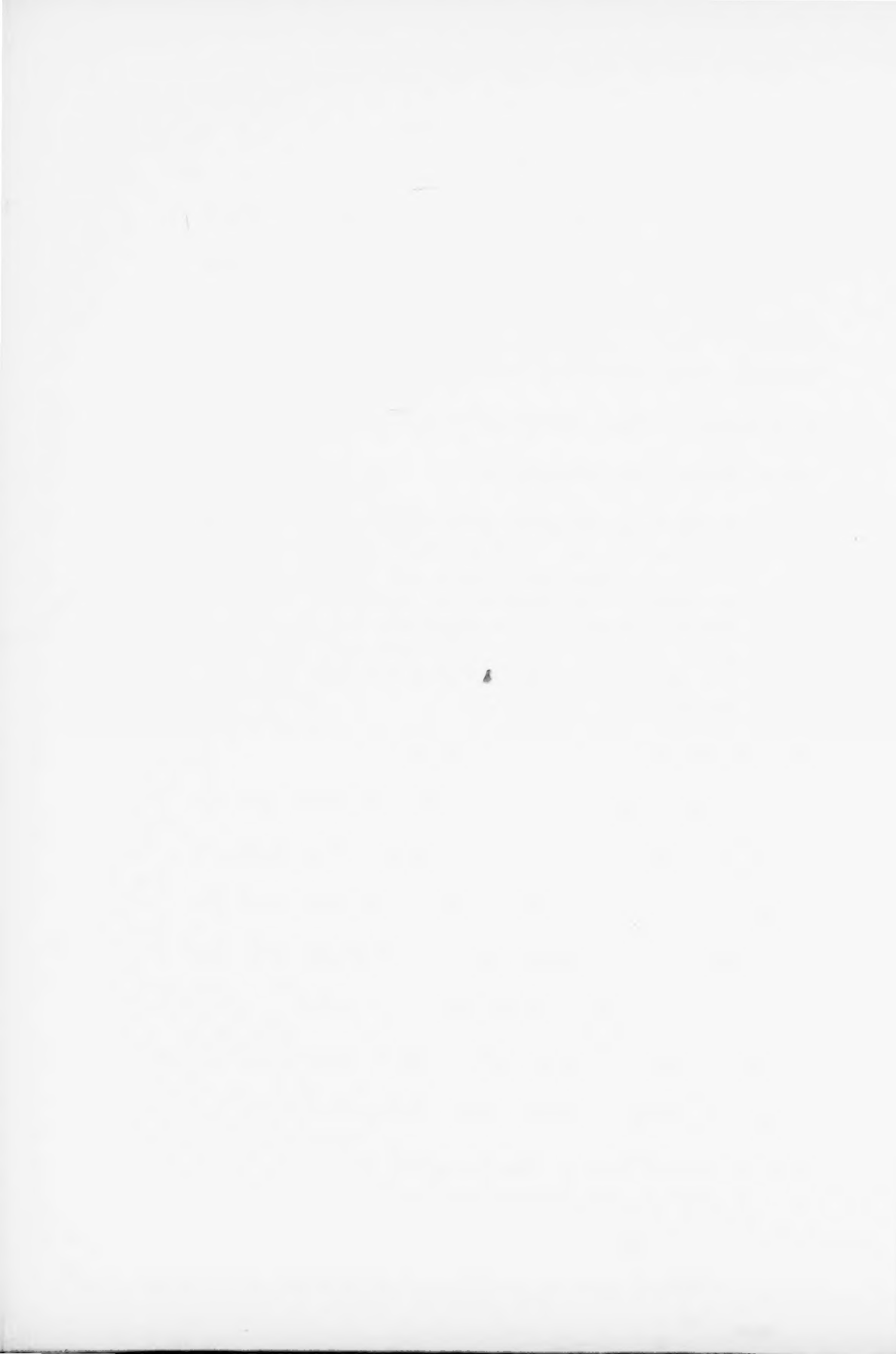


This case is not about civil jurisdiction under § 4. The case concerns jurisdiction pursuant to § 2. Below, all parties agreed that this is a § 2 case. The circuit court recognized this fact, stating:

Both the Tribes and State agree the dispute in this instance is not within the purview of section 4. Rather, the issue is whether or not Washington law relating to speeding should be classified as either criminal/prohibitory or civil regulatory.

938 F.2d at 147. Pet. A-5.

The circuit court ruled that if an offense did not include the legal possibility of imprisonment there was no jurisdiction under § 2. There is no authority for this per se rule. The circuit court cited none and neither do the tribes. The test established by this Court in Cabazon calls for



analyzing the state's policy and the tribal interest.

This case presents clearly and directly the question of whether there should be a per se rule. As we pointed out in our Petition, the state's policy and interest in safety on the public highway present a compelling case for criminal/prohibitory jurisdiction under § 2. Pet. 8-10.

Indeed, although they do not carry the legal possibility of imprisonment, traffic infractions under Washington law are not typical "civil proceedings". Such proceedings can only be commenced by a police officer, not by private citizens. Wash. Rev. Code § 46.63.030(1), (2). A failure to respond to the citation is a criminal offense. Wash. Rev. Code 46.63.060(2)(k). A failure to respond places an automatic



bar to the renewal of the driver license. Wash. Rev. Code 46.63.070(5), 46.63.060(2)(h).

The tribes apparently recognize that the circuit court has applied a per se rule. Their entire civil focus is based on the premise that there is no legal possibility of imprisonment for a traffic infraction. The tribes do not attempt to support the decision below based on the tests set out in Cabazon. The question of whether the tests in Cabazon should be set aside in favor of a per se rule should be resolved by this Court.

**THE REASONING OF THE CIRCUIT COURT  
CREATES A CONFLICT BETWEEN THE  
NINTH AND SEVENTH CIRCUITS**

In our Petition we urged this Court to accept this case to resolve a conflict between the Ninth Circuit's decision below and St. Germaine v.



Circuit Court of Vilas Cy, 938 F.2d 75 (7th Cir. 1991). The tribes attempt to reconcile the decisions by pointing out that St. Germaine involved the legal possibility of imprisonment and the decision below does not.

The problem with this argument is that it ignores the alternate holding in Part II of the decision below. As we pointed out in our Petition, the circuit<sup>12H</sup> court's reasoning in Part II could prohibit Washington from enforcing its law even if the legal possibility of imprisonment existed. Petition at 10-12.

In addition on November 11, 1991 Steven K. St. Germaine filed a Petition for a Writ of Certiorari with this Court to obtain review of the Seventh Circuit's decision in St. Germaine. Mr. St. Germaine is an enrolled member



of the Lac du Flambeau Band of Lake Superior Chippewa Indians who is challenging Wisconsin jurisdiction under § 2 of Pub. L. 83-280 It is our understanding that Mr. St. Germaine is also asking this Court to resolve the conflict between the Ninth and Seventh Circuit decisions.

#### CONCLUSION

For these reasons we respectfully request the the writ be granted.

DATED this 13th day of November, 1991.

Respectfully submitted,

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